

OHA PROVIDES LEADERSHIP IN COURT CASE TO
OBTAIN A STAY ON THE SALE OR TRANSFER OF CEDED LANDS

I. Statement of Facts and Background.

Since 1994, OHA has been pursuing in state court a moratorium on the sale of ceded lands until the claims of Native Hawaiians for the illegal overthrow have been resolved. OHA has joined with other Native Hawaiians in this effort.

Following the overthrow of the Kingdom of Hawai'i on January 17, 1893, the Provisional Government and subsequently the Republic of Hawaii assumed management of all lands formerly controlled by Queen Lili'uokalani (the crown lands), as well as the lands controlled by the government of the Kingdom of Hawai'i.

When the United States established the Territory in ¹⁸⁹⁸1897, it was without a vote of the citizens of the former Kingdom of Hawaii. The Organic Act provided that all proceeds from the public lands (the former crown and government lands) shall be applied by the government of the Territory of Hawaii to "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation, approved July seventeenth, eighteen hundred and ninety-eight." These lands were exempt from then existing public land laws of the United States by the issuance of this mandate which established "a special trust relationship between the United States and the inhabitants of Hawaii."

When Hawaii became a state, under Section 5(b) of the Admissions Act, the United States purported to pass title to the public lands, including the Hawaiian Home lands, to the State of

Hawaii. The United States "reaffirmed the trust relationship which existed between the United States and the Hawaiian people by retaining the legal responsibility of the State for the betterment of the conditions of Native Hawaiians under section 5(f) of the [Admissions Act]." None of these transfers, either from the Republic of Hawai'i to the United States, or from the United States to the State of Hawaii, involved the offer or acceptance of value for these lands, either to the Native Hawaiian people or the entities which purported to assume subsequent title.

II. The State May Not Alienate Ceded Lands Because It Lacks Marketable Title To the Ceded Lands.

The State bases its claim to title upon the Admissions Act, where the United States purported to transfer the ceded lands to the State to be administered as a trust for the benefit of Native Hawaiians and the general public. Because Native Hawaiians have a claim to ownership of the ceded lands, the State, particularly given its fiduciary duties towards native Hawaiians and Hawaiians, may not alienate the ceded lands without their consent.

The State counters that it "has full power and authority to manage, to alienate, and to dispose of ceded lands," stating that the Admission Act and the Hawaii Constitution authorized the alienation and disposition of public lands for valid public purposes. However, OHA argues that the term "valid public purposes" is far too general on which to base unlimited power to alienate the corpus of a trust.

The State argues that the term "ceded land" is synonymous with the phrase "public land and other public property" as defined in Section 5(g) of the Admissions Act and asserts that the United States granted the ceded lands to the State of Hawaii when it shifted the United States' title to the ceded lands to the State in 1959. Admissions Act Section 5(b). However, ceded lands are not synonymous with "public lands," despite defendant's assertion and despite the fact that the majority of State-held lands are ceded. The State Constitution and the Admissions Act placed ceded lands in a public trust; but in so doing they did not become "public lands", indistinguishable from all other public lands. The State has received lands from other sources.

As Section 5(f) makes perfectly clear, the United States did not make a gift of the ceded lands to the State of Hawaii; the lands were not theirs to give. The United States merely transferred title to a State administered trust so that the State could take over its duties as trustee. The Native Hawaiian beneficiaries were and remain the ultimate owners of the trust corpus.

III. Trust Principles Apply To the State.

The State does acknowledge that ceded lands granted by Section 5(b) of the Admissions Act are held by the State as the trustee of a public trust for native Hawaiians and the general public, including Native Hawaiians.

The Hawaii Supreme Court has stated, "Article XII, § 4 [of the Hawaii State Constitution] imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the § 5(f) trust provisions, and the citizens of the state must have a means to enforce compliance." Pele Defense Fund v. Paty. The State and its agencies owe the strict standards applicable to private trustees to the beneficiaries of the ceded lands trust. The State as trustee has a duty to preserve trust property "for the benefit of the Hawaiian people".

It is commonplace for natives to block attempted sales by the United States or states of native lands. For example, the Pueblo Indians held title to 460,000 acres when the land was acquired from Mexico in 1853 by the United States. The Pueblo Indians won a stay in 1919 from the United States Supreme Court prohibiting the U.S. Department of the Interior from disposing of their lands as public lands of the United States. Although the United States Congress retains the plenary power, under the United States Constitution, to extinguish native title to the land, even in these circumstances this power still remains subject to constitutional limitations. Moreover, the State does not have the plenary power to extinguish Native Hawaiian claims to the ceded lands, unlike the United States Congress.

Similar to the Native Hawaiian's case, the Pueblo Indians were "not seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership."

The U.S. Department of the Interior argued that the Indians were "wards of the United States . . . and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection." The Supreme Court held that even if this were true "it would not justify the defendants in treating the lands of these Indians--to which, according to the bill, they have a complete and perfect title--as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation." The Court directed the lower court to grant an order restraining the defendants from disposing of the lands in question until there was an adjudication on the merits. OHA is seeking a similar result here.

a. Duty of Loyalty

The duty of loyalty requires a trustee to administer a trust solely in the interests of the beneficiaries. In this case, the State as trustee has conflicting loyalties. Although the sale of land for a low income housing project may benefit the general public, it will not necessarily benefit the Hawaiian people. Two hundred years ago land was held in common by the Hawaiian people and for the most part freely available for living, farming, hunting, and gathering. Indeed, the Hawaiian Constitution of 1840 provided that all the lands of Hawai'i were held as a trust for the

people by Kamehameha. It stated that,

Kamehameha I . . . was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.

b. Duty to Deal Impartially with Beneficiaries

The duty to deal impartially arises between present and future beneficiaries. The current beneficiaries have an interest in having the trust property yield the highest current income. The future beneficiaries have an interest in preserving or expanding the trust corpus. The trustee must balance these two conflicting interests. In the public trust context, the duty of impartiality raises a serious issue with respect to the State's obligation as trustee to preserve trust property for future beneficiaries. Numerous State statutes mandate that adequate provision shall be made for the protection of traditional and customary Hawaiian rights. The Hawaii Constitution does not permit implementing legislation to "diminish or limit the benefits of native Hawaiians under Section 4 of Article XII". In addition, the State Constitution, the Admissions Act, and several State and federal statutes and resolutions acknowledge that the rights and interests of Native Hawaiians are unique and distinct from the general public.

c. Duty to Furnish Information

A trustee has the responsibility of providing the beneficiaries with complete and accurate information as to the administration of the trust. OHA has not been able to inventory the ceded lands under consideration for sale or transfer. The State does not have in any one location a complete inventory of ceded lands intended to be sold or traded in one location. Thus, the State has failed to inform the Hawaiian beneficiaries of the status of the ceded lands, as distinguished from other public lands. The State has failed to provide an accounting as to what agencies it has delegated its trust responsibilities over what portions of the trust corpus, what ceded lands it has sold and to whom, what percentage of the trust corpus has already been alienated and what ceded lands are planned for future alienation.

d. Duty to Preserve Trust Property

Although the state proposes to pay monetary compensation to OHA and DHHL from the proceeds of two proposed sales, the payments are not just compensation in this instance: (1) they are less than they would be if the land was valued at the "highest and best use" required by statute, and (2) they will not "benefit native Hawaiians" because continued loss to the private sector of ceded lands will not preserve a culture that depends on close ties with its ancestral lands for its continued existence.

Moreover, the proposed monetary compensation cannot obscure the fact that the corpus of the trust is being diminished by alienation and transfers of the ceded land, which is not then

replenished with other land.

IV. The Federal Government Has Apologized and Admitted Wrongdoing.

The federal government, from whom the state received all the ceded lands it holds now, has recognized that the overthrow and the taking of the Hawaiian Nation lands was illegal. The Apology Bill admits that the overthrow and taking of land was "illegal."

Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government;

The Apology bill also apologizes and recognizes the inherent right of self-determination of the Native Hawaiians.

The Congress . . . (3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination.

V. OHA Seeks Justice for the Native Hawaiians.

At the April 2, 1996 hearing at 9:00 a.m. in State Court, OHA will be seeking to stop the sale or transfer of ceded lands. Continued alienation of ceded lands is a breach of the State's duty to the future beneficiaries of the trust because it would eventually eliminate the land-based Hawaiian culture. Therefore there must be limits. Until these limits are determined, all further alienation of ceded lands must be restrained. Continued alienation of ceded lands is a breach of the State's duty because the just claims of Native Hawaiians to self-determination and the return of illegally taken lands are resolved. Until these claims

are honored and resolved, all further alienation of ceded lands must be restrained.